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John G. Howard

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LERNER, DAVID, LITTENBERG,
KRUMHOLZ & MENTLIK
600 SOUTH AVENUE WEST
WESTFIELD, NJ 07090

EXAMINER

KING, FELICIA C

ART UNIT

PAPER NUMBER

1794

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/549,738	Applicant(s) HOWARD ET AL.	
	Examiner FELICIA C. KING	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 February 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17, 20 and 22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-17, 20 and 22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

This Office Action is written in response to Applicant's Remarks dated 2/19/09.

Applicant has cancelled claims 18,19, and 21 in response to the Office Action dated 11/25/08.

Claim Rejections - 35 USC § 103

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
2. **Claims 1-4, 6, 13-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) in view of Wiedersatz (US 5,858,431).**

Regarding Claim 1: Higgins discloses a method of preparing a potato based food product [col.7, lines 63-64], the method comprising the steps of processing potatoes into potato articles having a desired size and shape [col. 7, lines 63-65], blanching said potato articles [col. 7, line 66], dipping said blanched potato articles in a solution to prevent non-enzymic oxidation of the potato articles [col. 7, line 67; col. 8, lines 1-2], drying said potato articles [col. 7, line 4], coating said potato articles in an emulsion containing starch, oil, salt and coloring in the form of paprika [col.6, lines 42-60] but does not disclose introducing coated articles into a hot air environment; and removing articles from hot air environment. However, Wiedersatz discloses dried potato articles that are coated with oil and flavoring, and passed through a hot air dryer [col.6, lines 44-67] and further discloses removing the articles from the air dryer by indicating that the chips are in final form upon leaving the baking unit and are inspected and packaged [col. 7,lines 59-62].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins and Wiedersatz before him or her to modify the method of Higgins to include a drying step disclosed in Wiedersatz because the drying step after coating the potato article will effectuate a desirable moisture loss [Wiedersatz col. 43-49]. Also, since the potato article in Higgins is contacted with an aqueous starch solution the coating would be watery and potentially make the potato article soggy without further hot air exposure and it would be undesirable to present a soggy potato article to the consumer.

Regarding Claim 2: Higgins discloses the step of blanching where the articles are blanched in 170°F (76°C) water for about 7 minutes [col. 7, lines 66-67].

Regarding Claim 3: Higgins discloses placing blanched potatoes in a solution containing Sodium Acid Pyrophosphate (“SAPP”) [col. 8, lines 1-2] which prevents non-enzymic oxidation of the potato articles.

Regarding Claim 4: Higgins discloses .5%-2% Sodium Acid Pyrophosphate [col. 7, lines 11-12].

Regarding Claim 6: Higgins discloses drying blanched and dipped potatoes that are oven dried at 180 -190°F [col. 8, lines 3-4].

Regarding Claims 13, 14, 15: Higgins discloses as method for treating potato articles but does not disclose where the coated article is further dried before subjecting to warm air environment, drying at temperatures between 100°C and 130°C nor 105°C and 120°C. However, Wiedersatz discloses coated potato articles that are dried in a microwave before subjecting to warm air environment of about 200°F to 225°F (93°C-107°C) [col. 7, lines 30-35]. Although Wiedersatz calls the air environment “hot”

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examiner has interpreted this as warm for purposes of examination of this claim due to the disclosed temperature range.

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins and Wiedersatz before him or her to modify Higgins to incorporate the temperatures in Wiedersatz because this range of temperatures are favorable and are commonly used drying potato articles and further aids in producing the crisp texture found in these products [col. 7, lines 38-41]

Although Wiedersatz does not recite the same temperature ranges as in the instant claims, one having ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the compositional proportions taught by Wiedersatz overlap the instantly claimed proportions and therefore are considered to establish a prima facie case of obviousness. *In re Malagari* 182 USPQ 549,553.

3. Claim 5 is rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) in view of Wiedersatz (US 5,858,431) and further in view of Baisier et al. (US 5,279,840).

Regarding Claim 5: Higgins discloses Sodium Acid Pyrophosphate solution at a temperature of 130°F (54°C) for 30 seconds [col. 8, lines 1-2] but does not disclose Sodium Acid Pyrophosphate solution at a temperature 65°C for around 60 sec. Wiedersatz discloses air drying after coating as discussed above. However, Baisier discloses a potato strip that is immersed in Sodium Acid Pyrophosphate solution at a temperature of 130°F-170°F (54°C-76°C) for about 1 minute (60 sec.) [col. 5, lines 42-44].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins, Wiedersatz and Baisier before him or her to modify the dipping step of Higgins to include the temperature and time of Baisier because it is common practice in the art to dip blanched strips of SAPP solution for as long as five minutes [col. 1, lines 52-53] and to perform the step at a range of 130°F-170°F [col. 5, lines 43-44]. Baisier suggests that the sugar content of potatoes is a determining factor in whether a SAPP step is needed [col. 1, lines 58-61] which may suggest that the time and temperature of exposure to SAPP depends on the type of potato utilized. Thus it would have been obvious to combine Baisier with Higgins to perform the SAPP as specified in the claims.

Further, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the temperature and time for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

4. Claims 7,12, 16,17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) in view of Wiedersatz (US 5,858,431) and in view of Collinge et al. (US 6,132,785).

Regarding Claim 7: Higgins discloses drying blanched and dipped potatoes that are oven dried at 180 -190°F [col. 8, lines 3-4] but does not disclose where the drying step is performed at ambient temperature. Wiedersatz discloses air drying after coating as discussed above. However, Collinge discloses where after dipping the blanched potato articles, they are exposed to ambient temperature [col. 4, lines 10-17].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins Wiedersatz, and Collinge before him or her to modify the drying steps of Higgins and Wiedersatz for the drying step at ambient temperature because although the time at this step would probably increase in order to attain the desired moisture content of the potato using the lower ambient temperature would advantageously allow for greater control over the drying step thereby mitigating the possibility of over drying of the potato in this initial drying step.

Regarding Claims 12: Higgins discloses as method for treating potato articles but does not disclose where the coated article is further dried before subjecting to hot air environment. However, Wiedersatz discloses coated potato articles that are dried in a microwave before subjecting to hot air environment [col. 7, lines 30-35]. Collinge discloses the hot air environment [col. 5, lines 50-56].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins, Wiedersatz and Collinge before him or her to modify the drying step of Higgins to include drying the potato article before further subjecting to hot air in order to further reduce the potato article to the desired moisture level after the addition of the coating emulsion.

Regarding Claims 16 and 17: Higgins discloses a method of treating a potato product but does not disclose introducing coated articles to an impingement oven temperature range or the hot air environment at a temperature of between 240 °C to 285 °C. Wiedersatz discloses air drying after coating as discussed above but at temperatures below 240 °C to 285 °C . However, Collinge discloses an impingement oven where the hot air environment is 350°F -450°F (177°C -232°C) [col. 5, lines 50-56].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins, Wiedersatz and Collinge before him or her to modify Higgins and Wiedersatz to state a desired temperature range as in Collinge because potato articles cooked around this temperature have a comparable finish to potato articles that are fried [col.5, lines 55-58].

Further, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the temperature for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

5. Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) in view of Wiedersatz (US 5,858,431) and further in view of Anderson et al. (US 5,139,800) as evidenced by Francis, Encyclopedia of Food Science and Technology Second Edition Vol. 1 2000. pg 611.

Regarding Claim 8: Higgins discloses a coating containing water [col. 6, lines 61-64], oil [col. 6, lines 52-54], starch [col. 5, lines 42- 58], tint (coloring) [col. 6, line 57-58] stabilizer [col. 6, lines 4-12], salt [col. 6, line 59] but does not explicitly disclose an emulsifier. Wiedersatz discloses air drying after coating as discussed above. However, Anderson discloses emulsifiers [col.3, lines 47-52].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins, Wiedersatz and Anderson before him or her to modify the coating compositions of Higgins and Wiedersatz to include the emulsifier of Anderson because emulsifiers are useful in food coated products [Anderson col. 5, lines

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42-43], and it would contribute to a more uniform dispersion of coating along the potato product [Francis, pg 611]. Further, it would have been obvious to include an emulsifier in a coating system that contains water and a larger quantity of oil in order to emulsify the mixture and has little to do with the method of cooking the food product(e.g. frying versus baking) and more to do with creating a homogenous dispersion of the ingredients/seasonings used to create the coating.

Further examiner cites, *In re Levin* 84 USPQ 232, which takes the position that "new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing no one else ever did the particular thing upon which the applicant asserts his right to patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function."

6. **Regarding Claim 9:** Higgins discloses water at 20%-90% [col. 6, lines 61-64], vegetable oil .1%-1.0% [col. 6, lines 52-55], Starch 10%-80% [col.6, lines 48-50], stabilizer .05%- 4.5% [col. 7, lines 8-9], salt 6.19% but does not explicitly disclose a percentage of Sunflower oil 24.00% - 28.00%, turmeric 0.01% - 0.10%, liquid paprika 0.01% - 0.10%, emulsifier 0.80% - 1.0%. Wiedersatz discloses air drying after coating as discussed above. However, Anderson discloses Sunflower Oil 10%-99% [col.5, lines 30-37], Turmeric .01%-0.10% [col. 5, lines 3-4], paprika 0.01%-.10% [col. 5, lines 25-27], emulsifier 0.5%-10% [col.5, lines 46-47].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins, Wiedersatz and Anderson before him or her to modify the coating compositions of Higgins and Wiedersatz to include the Sunflower oil, turmeric, liquid paprika, and emulsifier of Anderson because they are ingredients commonly used in coating food products and aiding in coloring of food compositions that are cooked [col. 1, lines 33-35; col. 6, lines 14-19].

Further examiner cites, *In re Levin* 84 USPQ 232, which takes the position that "new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing no one else ever did the particular thing upon which the applicant asserts his right to patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function."

Further, although Higgins and Anderson do not recite the exact percentages as in the instant claim, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the percentages of ingredients for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

7. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) in view of Wiedersatz (US 5,858,431) and further in view of Higgins et al. (US 5,753,286).

Regarding Claim 10: Higgins '607 discloses water [col. 6, lines 61-63], oil [col.6, lines 52-53], starch col. 6, lines 41-43], flour [col.5, lines 43-44], dextrin [col.6, lines 28-29], gum [col.6, lines 4-5], Sodium bicarbonate [col. 6, lines 20-25], salt [col.6, line 59], coloring [col. 6, line 57], oil [col.6 , lines 52-55], Sodium Acid Pyrophosphate [Col. 6, lines 13-15], but does not disclose dextrose. Wiedersatz discloses as discussed above. However, Higgins '286 discloses dextrose [col. 11, lines 2-3].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins '607, Wiedersatz and Higgins '286 before him or her to modify Higgins '607 to include the dextrose of Higgins '286 because dextrose is an effective coloring agent and is commonly used in batter to aid in the browning appearance of food products [col. 10, lines 66-67, col. 11, lines 1-4].

Further examiner cites, *In re Levin* 84 USPQ 232, which takes the position that "new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing no one else ever did the particular thing upon which the applicant asserts his right to patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function."

8. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) in view of Wiedersatz (US 5,858,431), Higgins et al. (US 5,753,286) and further in view Anderson et al. (US 5,139,800).

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Regarding Claim 11: Higgins '607 discloses water at 20%-90% [col. 6, lines 61-64], Cornstarch 25% to 40% [col. 7, lines 20] (where the claim recites Maize starch), Modified Potato Starch 15-60% [col. 7, lines 22-23], Rice Flour 5-20% [col.7, line 6], Potato dextrin 0-15% [col. 6, line 29; col. 7, line 7], Xanthan gum .05%-4.5% [col.7, line 8], Sodium Bicarbonate .8% [col.8, line 20], Puro AG (SAPP 40) 0.5% [col.9, line26], vegetable oil .1%-1.0% [col. 6, lines 52-55] but does not disclose the percentage of Maize starch, dextrose, sunflower oil, turmeric, paprika oleoresin, and guar gum. Further, Higgins '286 discloses dextrose 1-20% [col.11, lines 2-3]. Further, Anderson discloses Sunflower Oil 10-%-99% [col.5, lines 30-37], Turmeric .01%-0.10% [col. 5, lines 3-4], Paprika oleoresin 0.01%-.10% [col. 5, lines 25-27], guar gum .05%-.4% [col.3, lines 60-64]. Wiedersatz discloses hot air drying as discussed above.

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins '607, Wiedersatz, Higgins '286 and Anderson before him or her to modify the composition in Higgins '607 to include the additions disclosed in Wiedersatz, Higgins '286, and Anderson because t the dextrose in Higgins contributes to the browning capabilities of the coating composition [col. col. 10, lines 66-67, col. 11, lines 1-4], because in Anderson the sunflower oil may be used interchangeably with many other oils and is effective in its disclosed amounts [col. 3, lines 36-43] , turmeric and paprika are natural colorants and help achieve the desired color in the food coating [col. 5, lines 1-6] and guar gum which is another stabilizer which can be used in combination with the xanthan gum of Higgins '607 would make the composition more viscous [col. 5, lines 5—56].

Although, the named Higgins '607, Higgins '286, and Anderson and the instant claims differ in that they do not teach the exact same proportions as the recited in the instant claims, one having ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the compositional proportions taught by Higgins '607, Higgins '286 and Anderson overlap the instantly claimed proportions and therefore are considered to establish a prima facie case of obviousness. It would have been obvious to one having ordinary skill in the art to select any portion of the disclosed ranges including the instantly claimed ranges from the ranges disclosed in the prior art reference, particularly in view of the fact that; "The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages", *In re Peterson* 65 USPQ 2d 1379.

Further, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the percentages for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

Further, examiner cites *In re Levin* 84 USPQ 232, which takes the position that "new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing no one else ever did the particular thing upon which the applicant asserts his right to patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative

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relationship between the selected ingredients which produces a new, unexpected, and useful function.”

9. Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) and further in view of Anderson et al. (US 5,139,800).

Regarding Claim 20: Higgins discloses water at 20%-90% [col. 6, lines 61-64], Stabilizer .05%-4.5% [col.7, line 8], salt 6.19% [col. 9, line 48], and vegetable oil .1%-1.0% [col. 6, lines 52-55] but does not disclose sunflower oil, turmeric, and paprika oleoresin, emulsifier. However, Anderson discloses Sunflower Oil 10%-99% [col.5, lines 30-37], Turmeric .01%-0.10% [col. 5, lines 3-4], Paprika oleoresin 0.01%-.10% [col. 5, lines 25-27] guar gum .05%-.4% [col.3, lines 60-64] an emulsifier.

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins and Anderson before him or her to modify the composition in Higgins to include the additions disclosed in Anderson because the sunflower oil may be used interchangeably with many other oils and is effective in its disclosed amounts [col. 3, lines 36-43] , turmeric and paprika are natural colorants and help achieve the desired color in the food coating [col. 5, lines 1-6].

Although, Higgins and Anderson differ in that they do not teach the exact same proportions as the recited in the instant claims, one having ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the compositional proportions taught by Higgins and Anderson overlap the instantly claimed proportions and therefore are considered to establish a prima facie case of obviousness. *In re Malagari* 182 USPQ 549,553.

Further, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the percentages for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

Further examiner cites *In re Levin* 84 USPQ 232, which takes the position that "new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing no one else ever did the particular thing upon which the applicant asserts his right to patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function."

10. Claim 22 is rejected under 35 U.S.C. 103(a) as being unpatentable over Higgins et al. (US 5,976,607) in view of Higgins et al. (US 5,753,286) and further in view Anderson et al. (US 5,139,800).

Regarding Claim 22: Higgins '607 discloses water at 20%-90% [col. 6, lines 61-64], Modified Potato Starch 15-60% [col. 7, lines 22-23], Rice Flour 5-20% [col.7, line 6], Potato dextrin 0-15% [col. 6, line 29; col. 7, line 7], Xanthan gum .05%-4.5% [col.7, line 8], Sodium Bicarbonate .8% [col.8, line 20], Puron AG (SAPP 40) 0.5% [col.9, line26], vegetable oil .1%-1.0% [col. 6, lines 52-55] but does not disclose dextrose Sunflower Oil 10-99% [col.5, lines 30-37], Turmeric .01%-0.10% [col. 5, lines 3-4], Paprika oleoresin 0.01%-.10% [col. 5, lines 25-27], guar gum .05%-.4% [col.3, lines 60-

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64]. However, Higgins (5,753,286) discloses dextrose [col.11, lines 2-3]. However, Anderson discloses Sunflower Oil 10%-99% [col.5, lines 30-37], Turmeric .01%-0.10% [col. 5, lines 3-4], Paprika oleoresin 0.01%-.10% [col. 5, lines 25-27], guar gum .05%-.4% [col.3, lines 60-64].

At the time of the invention, it would have been obvious to one of ordinary skill in the art having the teachings of Higgins '607, Higgins '286 and Anderson before him or her to modify the composition in Higgins '607 to include the additions disclosed in Higgins '286, and Anderson because the dextrose in Higgins contributes to the browning capabilities of the coating composition [col. col. 10, lines 66-67, col. 11, lines 1-4], because in Anderson the sunflower oil may be used interchangeably with many other oils and is effective in its disclosed amounts [col. 3, lines 36-43] , turmeric and paprika are natural colorants and help achieve the desired color in the food coating [col. 5, lines 1-6] and guar gum which is another stabilizer which can be used in combination with the xanthan gum of Higgins '607 would make the composition more viscous [col. 5, lines 5-56].

Although, the named Higgins '607, Higgins '286, and Anderson and the instant claims differ in that they do not teach the exact same proportions as the recited in the instant claims, one having ordinary skill in the art at the time the invention was made would have considered the invention to have been obvious because the compositional proportions taught by Higgins '607, Higgins '286 and Anderson overlap the instantly claimed proportions and therefore are considered to establish a prima facie case of obviousness. It would have been obvious to one having ordinary skill in the art to select any portion of the disclosed ranges including the instantly claimed ranges from the

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ranges disclosed in the prior art reference, particularly in view of the fact that; "The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages", *In re Peterson* 65 USPQ 2d 1379.

Further, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the percentages for the intended application, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272.

Further, examiner cites In re Levin 84 USPQ 232, which takes the position that "new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing no one else ever did the particular thing upon which the applicant asserts his right to patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function."

Response to Arguments

1. Examiner notes that Claims 18, 19 and 21 have been cancelled in response to the Office Action dated 11/15/08.
2. Applicant has overcome objections to claims 5, 6, 8, 10, 12, and 16 by correcting improper multiple dependent claim.

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3. Applicant has overcome 112 2nd paragraph rejections regarding Claims 9,11-17, 20 and 22 directed toward the use of trademark/trade name by replacing trademark/trade names with generic names.

4. Applicant's arguments, see pgs 11 -14, filed 2/19/09, with respect to Higgins et al (US 5,976,607) in view of Sloan et al. (5,141,759) rejection of claims 1-4,6,7,12,13, and 16 have been have been considered but are moot in view of the new ground(s) of rejection. **New grounds of rejection** have been made as discussed above under Higgins et al (US 5,976,607) in view of Wiedersatz (US 5,858,431) with regard to claims 1-4, 6, and 13. **New grounds of rejection** have been made as discussed above under Higgins et al. (US 5,976,607), Wiedersatz (US 5,858,431), and Collinge et al. (US 6,132,785) with regards to claims 7, 12, and 16.

5. Applicant's arguments, see pg 14, filed 2/19/09, with respect to Higgins et al. (US 5,976,607) and Sloan et al. (US 5,141,759) and Baisier et al. (US 5,279,840) rejection of Claim 5 have been have been considered but are moot in view of the new ground(s) of rejection. **New grounds of rejection** have been made as discussed above under Higgins et al (US 5,976,607), Wiedersatz (US 5,858,431) and Baisier et al. (US 5,279,840) with regard to claim 5.

6. Applicant's arguments, see pg 14-15, filed 2/19/09, with respect to Higgins et al. (US 5,976,607) and Sloan et al. (US 5,141,759) and Anderson et al. (US 5,139,800) rejection of claims 8 and 9 have been have been considered but are moot in view of the new ground(s) of rejection. **New grounds of rejection** have been made as discussed above under Higgins et al (US 5,976,607), Wiedersatz (US 5,858,431) and Anderson et al. (US 5,139,800) as evidenced by Francis, Encyclopedia of Food Science and

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Technology Second Edition Vol. 1 2000. pg 611 with regard to claims 8 and 9 with regard to claims 8 and 9.

7. Applicant's arguments, see pg 15, filed 2/19/09, with respect to Higgins et al. (U.S. 5,976,607) and Sloan et al. (U.S. 5,141,759), Higgins et al. (U.S. 5,753,286) rejection of claim 10 have been have been considered but are moot in view of the new ground(s) of rejection. **New grounds of rejection** have been made as discussed above under Higgins et al. (US 5,976,607), Wiedersatz (US 5,858,431), Higgins et al. (US 5,753,286) regarding claim 10.

8. Applicant's arguments, see pg 16, filed 2/19/09, with respect to Higgins et al. (US 5,976,607), Sloan et al. (US 5,141,759), Higgins et al. (US 5,753,286) and further in view Anderson et al. (US 5,139,800) rejection of claim 11 have been have been considered but are moot in view of the new ground(s) of rejection. **New grounds of rejection** have been made as discussed above under Higgins et al. (US 5,976,607) in view of Wiedersatz (US 5,858,431), Higgins et al. (US 5,753,286), Anderson et al. (US 5,139,800) regarding claim 11.

9. Applicant's arguments, see pg 16-17, filed 2/19/09, with respect to Higgins et al. (U.S. Patent Number 5,976,607) and further in view of Sloan et al. (U.S. Patent Number 5,141,759) and further in view of Keijbets (The manufacture of pre-fried Food products, Frying: Improving Quality 2001) rejection of claims 14 and 15 have been have been considered but are moot in view of the new ground(s) of rejection. **New grounds of rejection** have been made as discussed above under Higgins et al. (US 5,976,607) and Wiedersatz (US 5,858,431) with regard to claims 14 and 15.

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10. Applicant's arguments see page 18, filed 2/19/09 with respect to Higgins et al. (US 5,976,607) and further in view of Anderson et al. (US 5,139,800) rejection of claim 20 have been fully considered but **they are not persuasive**. Applicant states that Higgins is directed toward a coating for food fried in oil and that Anderson is tailored towards food cooked in the microwave and contends that because the ingredients for the coating are intended for use in different cooking methods that there is no motivation to combine.

11. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Higgins and Anderson both utilize oil as part of their coating ingredients. Higgins uses less oil because the main purpose of the oil is to help bind the rest of the coating ingredients together [col. 6, lines 52-56]. However, the potato article in Higgins is intended to be fried in oil thereby mitigating the need for excess oil in the coating. Anderson requires a higher percentage of oil in combination with colorants such as turmeric and paprika in its coating composition to provide texture and flavor to foods intended for microwave cooking in order to in part browning, characteristic of conventional baking [col. 2, lines 13-30]. It is commonly known in the art to use paprika and turmeric as coloring agents and their combination with oil and other ingredients such as salt and to form coating for food

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products. Further the applicant claims that the potato article would be exposed to a hot air environment not necessarily a hot oil environment. This cooking environment is in line with Anderson and would lead one of ordinary skill in the art to recognize that if a food article is to be cooked via a hot air, that it would be advantageous provide a coating that would aid in the browning of the food material.

12. Applicant's arguments see page 18, filed 2/19/09 with respect to Higgins et al. (US 5,976,607) and further in view of Anderson et al. (US 5,139,800) rejection of claim 22 have been have been considered but are moot in view of the new ground(s) of rejection. **New grounds of rejection** have been made as discussed above under Higgins et al. (US 5,976,607) in view of Higgins et al. (US 5,753,286) and further in view Anderson et al. (US 5,139,800).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to FELICIA C. KING whose telephone number is (571)270-3733. The examiner can normally be reached on Mon- Thu 7:30 a.m.- 5:00 p.m.; Fri 7:30 a.m. - 4:00 p.m. alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on 571-272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/FELICIA C KING/
Examiner, Art Unit 1794

/JENNIFER MCNEIL/
Supervisory Patent Examiner, Art Unit 1794